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October 18, 2005

CERTIFIED MAIL 7005 1160 0000 7299 7002

DIRECTOR OF THE OFFICE OF CIVIL RIGHTS
U.S. Environmental Protection Agency
MAIL CODE 1201A
1200 Pennsylvania Ave NW
Washington, D.C. 20460



Dear DIRECTOR OF THE OFFICE OF CIVIL RIGHTS,

SUBJECT: TITLE VI CIVIL RIGHTS COMPLAINT

Re: El Paso and Dona Ana County Metals Site, ASARCO Primary Copper Smelter, El Paso, Texas

Please accept this letter as a formal **TITLE VI CIVIL RIGHTS COMPLAINT** on the Environmental Protection Agency Region 6 Superfund Division. EPA has chosen to disregard the **SMELTERTOWN CEMETERY, El Paso, Texas** as an Area of Concern, a site impacted by industrial hazardous waste. This decision and disparate treatment is culturally insensitive to the customs of the Roman Catholic Hispanics and related religious ceremonial aspects to worship in this cemetery. Specifically "The Day of the Dead" (*El Dia de los Muertos* in Spanish) is a Mexican, Mexican-American and Filipino Celebration of the memory of the deceased ancestors. (Emphasis Added) This celebration occurs on November 1 and November 2, coinciding with the similar Roman Catholic celebrations of All Saints Day and All Souls Day.¹ Mexicans have celebrated the Day of the Dead since the year 1800 B.C. It is a Catholic Christian ritual intermixed with folk culture. It does not honor the dead, but our dead relatives. It is a ritual that gives us an opportunity to reflect upon our lives, our heritage, our ancestors and the meaning and purpose of our own existence. It's a day of happiness because people will be remembering loved ones.² EPA Region 6 Superfund has failed to protect the people who worship, work, and recreate in the Smeltertown Cemetery, El Paso, Texas. I respectfully request that the United States Department Of Justice inquire as to whether the United States Environmental Protection Agency ("EPA") Region 6 and the Texas Commission for Environmental Quality ("TCEQ") and the El Paso City County Health Department ("EPCCHD") has failed to provide equal protection and due process clauses of the Fifth and Fourteenth Amendments³ and any other federal and state regulations.

Specifically, the assertion is made that on March 6th 1990, Dr. Thomas M Dydek an environmental toxicologist with the Texas Air Control Board ("TACB")⁴ documented and reported high levels of arsenic contamination northeast of the American Smelting and Refining Company ("ASARCO").⁵ This is a factual misrepresentation. Dr. Dydek's vast prior experience in the employment with the EPA allowed him to have in-depth knowledge of human health effects to exposures of hazardous toxic substances, an expert having full knowledge for assessing the potential adverse effects from exposure to environmental contaminants, familiar with the EPA work ethic including Superfund, risk reduction rules, resource and recovery act ("RCRA"), no

¹ Day of the Dead - Wikipedia, the free encyclopedia

² Common Misconceptions about the Day of the Dead Celebrations by May Herz

³ El Paso Times - Descendants want hazardous slag cleared - October 14, 2005

⁴ Texas Air Control Board now Texas Commission on Environmental Quality - TCEQ

⁵ El Paso Herald Post - ASARCO arsenic stays near plant - March 6th 1990

enc. 2. YJL
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migration petitions, air quality permitting, and other remediation activities.⁶ Dr. Dydek and the TACB now TCEQ did not consider Smeltertown Cemetery an impacted site. (Emphasis supplied.).

1. EPA & TCEQ Ignores The Superfund Amendments and Reauthorization Act ("SARA"), which encourages greater citizen participation and State involvement in every phase of the Superfund program. Compromising the health of Roman Catholic worshippers when they desire pursue religious events at the Smeltertown Cemetery. EPA stated that it does not have plans to remove slag fines from the cemetery.⁷
2. EPA & TCEQ has failed to promulgate all aspects of the Emergency Planning and Community Right to Know Act ("EPCRA") with relationship to hazardous "slag fines" releases into the Smeltertown Cemetery. TCEQ Regional Director Archie Clouse stated that potentially hazardous chemicals such as Lead and Arsenic were detected in fertilizer produced by Ionate Corporation of America, indicating that this company purchased materials from Oglebay Norton Minerals, Inc ("Oglebay") a slag crushing company, further stating that slag fines or crushed slag can be hazardous.⁸ Mr. Archie Clouse indicated that the commission investigators traced the lead and arsenic in the slag fines to the Oglebay slag crushing facility. Slag fines are a byproduct of Asarco's smelting process.⁹ Mr. Archie Clouse indicated that the commission reported violations at the Oglebay Site in 2001, that baghouse dust contained arsenic, cadmium, chromium, lead, mercury, selenium, barium and silver. Furthermore indicated that Oglebay was a grandfathered facility producing 15,588 to 20,000 tons of slag fines between May 1999 and December 2001. Mr. Archie Clouse and his TCEQ Agency Enforcement Office have a fiduciary duty to protect the general public using the Smeltertown Cemetery from hazardous toxic chemical exposure. (Mr. Archie Clouse indicated that people who clean the cemetery in the future wear good mask filters. Additionally, the TCEQ Project Manager Mr. Omar Valdez with TCEQ State Superfund office in Austin supervised the removal of soil contaminated with the same material on a secured industrial property. El Paso Times October 14, 2005) Oglebay-Norton has removed the all traces of the crusher facility and appears to have abandoned the site. The Smeltertown Cemetery is a public area and EPA & TCEQ have allowed this public site to remain contaminated with ASARCO/OGLEBAY-NORTON slag fines.
3. EPCRA requires Asarco, Encycle/Texas & Oglebay Norton to notify EPA & TCEQ of whether the substance is extremely hazardous. Indicating any known or anticipated acute or chronic health risks associated with the exposure, and where necessary advice regarding medical attention for exposed individuals, providing proper precautions, estimating the quantity released into the environment and whether the release occurred to air, water and /or land. Asarco has failed to identify all chemicals processed with the primary copper facility and production of slag fines. Office of the Texas Attorney General John Coryn, Mr. Paul Sarahan Director of Litigation on request ID#124873 determined a formula for a chemical compound is a secret process protected from discovery.¹⁰ On an agency EPA/ASARCO e-mail memo dated June 28, 2001, handwritten notes indicated, "TCEQ is concerned that the El Paso sampling plan doesn't undermine the ASARCO Corpus Christi Sampling Delima."¹¹ (Emphasis Added). Smeltertown Cemetery is exposed to the same materials Encycle/Corpus Christi processed and shipped to ASARCO El Paso facility. The community of El Paso Texas

⁶ Dr. Thomas M. Dydek, Ph.D., D.A.B.T., P.E. Curriculum Vitae

⁷ El Paso Times - Descendants want hazardous slag cleared - October 14, 2005

⁸ KVIA Channel 7 - El Paso, Texas September 9th, 2005

⁹ El Paso Times - Arsenic, lead found in fertilizer used in EP - September 12, 2005

¹⁰ Texas State Attorney John Cornyn Open Records Letter Ruling OR-99-1654 - June 17, 1999

¹¹ EPA/ASARCO Meeting: June 28, 2001 Handwritten Memo

and the Roman Catholics Mexican - American people using the Smeltertown Cemetery have a right to know what this dilemma presents. EPCRA requires notification, for the benefit of the area residents frequenting and observing the Day of the Dead. This material continues to be transported by the wind from sources located on ASARCO controlled property. The Smeltertown Cemetery is now partially covered in black slag fines. Tombs where relatives lay are covered in some areas with 6 to 12 inches of slag fines making them unreadable.

4. ASARCO Special provision Number 17 on Operating Permit #20345 required ASARCO to control dust on the facility. TCEQ granted ASARCO a waiver thus not requiring effective dust control measures to be enforced. ASARCO claimed that because no roads were in use that dust created from road and unpaved areas needed no watering to maintain dust control measures. When in fact Border Patrol, Union Pacific, El Paso Electric and ASARCO security units traverse these areas frequently on a daily basis.
5. ASARCO & ENCYCLE/ TEXAS Inc. entered in to Civil Action H-99-1136 with United States and State of Texas¹² To perform appropriate RCRA corrective action at Encycle and ASARCO's El Paso facility. Implementing an enhanced corporate-wide environmental management and compliance auditing system at Asarco's operating domestic facilities. The Department of Justice ("DOJ") required ASARCO to implement an air quality project to reduce particulate pollution in the El Paso Area. Furthermore not only did the DOJ Lois Schiffer indicate "This settlement and others like it mark a new generation of environmental enforcement", "We are serious about addressing comprehensively those nationwide companies that violate our environmental laws." EPA Assistant Administrator for Enforcement and Compliance Assurance Steven A. Herman. "This comprehensive approach to resolve a company's environmental liabilities is a fundamentally new way to protect public health and the environment." It is unprecedented and should serve as a model for other companies in addressing their environmental problems." Texas Natural Resource Conservation Commission ("TNRCC")¹³ Executive Director Mr. Jeff Saitas stated, "We believe this is an appropriate conclusion to this effort"¹⁴, "Contaminated areas will be cleaned up..." ASARCO agreed to spend 1.8 million to pave roads, alleys and parking lots. Smeltertown Cemetery and the Roman Catholic Mexican Americans who worship and observe "The Day of the Dead" have received Disparate Treatment from TCEQ Regional Enforcement Director Mr. Archie Clouse.¹⁵
6. EPA Region 6 Superfund Division under the direction of Mr. Sam Coleman P.E. and his staff implemented the El Paso and Dona Ana County Metals Survey on July 6, 2001. Produced a sampling report on August 17, 2001. Multiple sites were identified and sampled. Soil was collected and analyzed for contamination. Environmental and Ecology Inc performed the wide area survey, under the direction of Mr. Kevin Jaynes and EPA Site assessment manager Mr. Jon Reinhart. The area wide assessment included parks, schools, a university and open areas. The EPA site assessment team failed to consider the Disparate Impact and Effects on the Smeltertown Cemetery by not including this public area in the area wide assessments.¹⁶ EPA Superfund Team has compromised public health for Roman Catholics worshipping, people working to clear the Smeltertown Cemetery for the celebration of the Day of the Dead. (Emphasis Added).

¹² Federal Register / Vol 64, No. 85 /Tuesday, May 4, 1999

¹³ TNRCC - now the Texas Commission on Environmental Quality

¹⁴ Department of Justice - Press Release #134: 04-15-99

¹⁵ El Paso Times - Descendants want hazardous slag cleared - October 14, 2005

¹⁶ Summary of Arsenic Concentrations (Eastern & Western Sheet) Fig A.4.1 & A.4.2

7. The El Paso City County Health Department under the direction of Dr. Magana has failed to notify area residents of the health impacts of arsenic, lead & cadmium contamination from slag fines and air emission sources from ASARCO on the community of La Calavera and to visitors traveling to the Smeltertown Cemetery on the Day of the Dead. (Emphasis Added)
8. EPA Carl Bolden indicated that ASARCO run bioavailability analysis suggesting that soils (as opposed to slag or slag fines) should be analyzed, collected from ASARCO property closest to San Marcos Street.¹⁷ Once again Smeltertown Cemetery received disproportionate adverse environmental and health assessments. Executive Order 12898 requires "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." ASARCO represented to EPA Amy McGee on February 4th, 2002 that slag contained Arsenic and Lead indicating, "slag is not mobile but that slag that has been crushed into small particles can be transported by the wind."¹⁸ (Emphasis added)
9. OGLEBAY-NORTON MINERALS, INC and the DOJ pursued settlement negotiations concerning San Marcos Street soil clean up¹⁹; Oglebay sought protection from RCRA for the materials produced at the crushing facility adjacent to the Smeltertown Cemetery claiming that material was exempted thru BEVILL exemptions.²⁰ The BEVILL exemption may apply for the material stored on the Oglebay Crusher Site, however this exemption no longer applies for the material stored at the site. The slag fines have been allowed to contaminate public use areas such as the Smeltertown Cemetery. The DOJ has allowed Oglebay, ASARCO, and Encycle to cause hazardous toxic slag fines to spread. No containment or management practice was implemented to protect Smeltertown Cemetery from contamination.²¹ This appears to be a current RCRA violation because the slag fines in the Smeltertown Cemetery are allowed to blow and disperse in an uncontrolled fashion.
10. Mr. Jorge Vergen property manager of The El Paso Catholic Diocese indicated that "Nobody wants to take responsibility for it", "Residents of La Calavera neighborhood took it upon themselves to maintain the cemetery, and the neighbors had no idea that they were dealing with slag fines." "They did not use masks or protective suits when they cleaned the cemetery". "We had no idea there was anything hazardous out there".²² The El Paso Catholic Diocese maybe an innocent landowner. It does not produce toxic waste, it does not deal in commercial enterprise in commodities, and it deals with the salvation of lost souls and spreading the message of salvation of our Lord Jesus Christ our God.

Conclusion

EPA Superfund Region 6 has failed to consider the impacts to Roman Catholics, Mexican-Americans and other religious believers from seeking protection to safeguard health during the Day of the Dead celebration and during funeral interments at the Smeltertown Cemetery, El Paso, Texas. In each and every case multiple documents exist recording each instance every Federal, State and Local agencies fail to consider the population segment that uses the Smeltertown Cemetery. This omission is an egregious willful act that denies Roman Catholic, Mexicans, Mexican-Americans, of all ages due process of law. The

¹⁷ ASARCO letter to EPA Amy McGee Esq. 6RC-S December 14, 2001

¹⁸ ASARCO letter to EPA Amy McGee Esq. & TNRCC Brad Wilkinson February 4th, 2002

¹⁹ Squire Sanders letter to EPA Amy McGee Administrative Consent Agreement March 28th, 2002

²⁰ Squire Sanders letter to EPA Amy McGee April 29, 2002

²¹ TNRCC Bethany Carl e-mail to TNRCC Archie Clouse April 11, 2002 3:38 pm

²² El Paso Times - Descendants want hazardous slag cleared - October 14, 2005

Environmental Protection Agency under the color of office²³ has failed to keep people free from harm. The EPA is the lead agency in charge of remediation actions in this region.

1. Dr. Thomas M. Dydek knew the environmental harm ASARCO creates for area residents. Dr. Dydek has been employed by ASARCO as an expert witness to defend his client. Dr. Dydek was in a position of trust when he was employed with the EPA and reviewed Asarco's permit, he was again in a position of trust when he worked for the Texas Air Control Board. No violations were cited against ASARCO - even though his reports demonstrated enormous releases to the environment that is hazardous to human health.
2. TNRCC Executive Director Mr. Jeff Saitas indicated that contaminated areas would be cleaned up. TNRCC now TCEQ continues to fail to clean up the contaminated areas.
3. EPA Superfund Region 6 Site Assessment Manager Mr. Jon Reinhart indicated that no clean up was planned for the Smelertown Cemetery.²⁴ EPA has knowledge of many other areas in this community are poisoned by ASARCO and continues to fail to mitigate damages caused by ASARCO and the offsite contamination it has burdened on this community.
4. The Department of Justice and Lois Schiffer in an error of judgment. Allowed ASARCO to self regulate and to determine what impacted sites and areas it contaminated. DOJ has perpetuated an environmental crime of a magnitude beyond imagination. ASARCO and its officers have no intention to mitigate damages caused by its operations. It has filed for bankruptcy to avoid responsibility. I urge the DOJ to review the matter and consider new action. An enforceable Civil Action H-99-1136 is in place and DOJ has failed to protect me, my family and other area residents from continuous exposure and contamination caused by ASARCO and its century operation.

To illustrate EPA's inherent difficulties of timing and proof associated with environmental justice actions. On Sunday October 30, 2005 more people will continued to be exposed to slag fines as they visit the Smelertown Cemetery. The official annual days of observance for the Day of the Dead is November 1st & November 2nd, however Roman Catholics families first attend Sunday Mass then travel to the Smelertown Cemetery to remember a family relative.

More people will travel to the adjacent impacted areas, the Mt. Christo Rey pilgrimage will take place on October 30, 2005 it attracts at least 25,000 to 50,000 area residents who walk on dirt paths, taking their children with them. ASARCO stated in the recent Texas State of Administrative Hearing to Judge Newchurch - the emissions "smacked" the mountain for at least a century. EPA Superfund Region 6 staff sampled the base of Mt. Christo Rey and found high levels of heavy metals. No plan of action has been formulated to provide safeguards to protect people from exposure to these materials.

It appears that many federal, state and local regulatory agencies continue to fail to provide equal protection under the color of law, color of office. In every apparent turn they only offer protection for the companies that pollute and release contaminants into public areas. They fail to cooperate with each other to protect the public.²⁵

Please do not hesitate to contact me at the number above if you have any questions regarding the attached comments or if I maybe of assistance. Thank you for your consideration of my request to investigate this Title VI Civil Rights Complaint on EPA Region 6 Superfund Division.

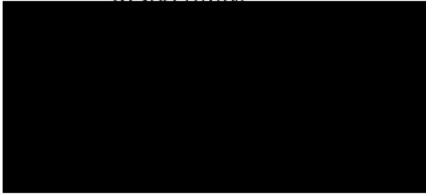
²³ FBI website - Investigative Programs - Civil Rights - Color of Law

²⁴ El Paso Times - October 14th, 2005 Descendants want hazardous slag cleared

²⁵ TCEQ Enforcement Report pages 219 thru 220 - "Spills & Improper Waste Management..."

October 18, 2005

Respectfully,



cc:

W/ CD-ROM Silvestre Reyes, (U.S. Congressman)

W/o attachments

John Cornyn, (U.S. Senator)

Eliot Shapleigh, (Texas State Senator)

Gregg Abbott, (Texas State Attorney)

Kathleen Hartnett, (TCEQ, Chairperson)

R.B. Ralph Marquez (TCEQ, Commissioner)

Larry R. Soward (TCEQ, Commissioner)

John Cook, (Mayor City of El Paso)

Enclosed:

CD Rom w/Digital Photos & Reference documents
El Paso Times - October 14, 2005 edition

U.S. Congressman Reyes

El Paso Office
310 N. Mesa, Suite 400
El Paso, Texas 79901
Phone: (915) 534-4400
Fax: (915) 534-7426

Hand Delivered

October 18, 2005

Honorable Congressman Sylvestre Reyes,

Today I present my formal Title VI Civil Rights complaint to your office. I need your assistance to assure that my concerns do not fall on deaf ears. Our community is not receiving the proper attention, our concerns deserve. You are my elected representative and you have the full authority to act on my behalf to assure that my rights under the laws of the United States, protected by our U.S. Constitution are not abridged by the Environmental Protection Agency or the Department of Justice. I respectfully request that you consider using your congressional authority to ascertain the facts.

Provided to your office today is a six-page letter outlining the concerns with related attachments. A Cd-rom of these documents and site photographs is included.

Sincerely Yours,

